TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 180

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, ET AL., PETITIONERS,

vs.

RISS AND COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 13, 1962
CERTIORARI GRANTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Sixth Circuit		
Appendix to brief of plaintiffs-appellants consisting of proceedings transpiring before the United States District Court for the Western District of Kentucky	A	1
Relevant docket entries	1	1
Complaint	2	2
Order dismissing complaint	8	7
Exhibit "A" to complaint—Excerpts from Local Cartage Agreement	9	8
Appendix to brief of defendant-appellee	16a	15
Answer and counterclaim	17	15
Amended and supplemental answer and counterclaim	24	21
Exhibit "A" to complaint—Excerpts from Local Cartage Agreement	27	24

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 30, 1962

	Original	Print
Argument and submission of case	30	26
Judgment	31	26
Opinion, Cecil, J.	32	27
Order denying petition for rehearing	36	30
Clerk's certificate (omitted in printing)	37	30
Order allowing certiorari	38	31

[fol. A]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON and ELVIN PEAY, Plaintiffs-Appellants,

versus

RISS AND COMPANY, INC., Defendant-Appellee.

Appeal From the United States District Court for the Western District of Kentucky, at Louisville, Kentucky, Henry L. Brooks, Judge.

Appendix for Plaintiffs-Appellants

[fol. 1]

RELEVANT DOCKET ENTRIES

1960

5–17 Complaint filed with Exhibit A. Summons issued and delivered to U. S. Marshal with copy of Complaint and Exhibit A.

7–21 "Answer and Counterclaim" filed by H. Bemis Lawrence, Attorney for Defendant.

1961

2– 2 Order dated 2-2-61 signed by Judge Brooks—motion of defendant to dismiss sustained and complaint dismissed. Copies to Ralph H. Logan and H. Bemis Lawrence.

3– 1 Appeal Bond ($250.00 cash bond), General Drivers, Warehousemen and Helpers, Local #89, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay, principals, by Ralph Logan, their attorney, and Ralph Logan, surety—filed.

[fol. 2]

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No.

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON, and ELVIN PEAY, Plaintiffs,

v.

RISS AND COMPANY, INC., 3433 S. 7th Street, Louisville, Kentucky, Serve: Joseph O. Mathes, Defendant.

COMPLAINT—Filed May 17, 1960

1. The Plaintiff, General Drivers, Warehousemen and Helpers, Local Union #89, is a labor organization as defined in Section 2, Sub-section (5), of the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Act, and has its principal place of business at 3813 Taylor Boulevard, Louisville, Jefferson County, Kentucky, hereinafter referred to as Local #89.

2. The Plaintiffs, Virgil Peay, John Kendall and Elvin Peay, are residents of the State of Indiana, and Sylvester Davidson, Newton Stucker and George Abell are residents of Louisville, Kentucky, and are members of said Local #89 and employees of the Defendant, Riss and Company, Inc. [fol. 3] at Louisville, Kentucky, and are employees as defined in Section 2, Sub-section (3) of the Act.

3. (a) The Defendant, Riss and Company, Inc., hereinafter called Riss, is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, as a common carrier, under Certificates of Convenience and Necessity issued by the Interstate Commerce Commission, and as such carrier, maintains a freight terminal at 3433 S. 7th Street, Louisville, Kentucky.

(b) Now, and at all times material herein, Riss is and has been engaged in "commerce" and in operations "affecting commerce", as defined in Section 2, Sub-sections (6) and (7) of the Act, respectively.

(c) Riss is an "employer", as defined in Section 2, Subsection (2) of the Act.

4. Jurisdiction is conferred upon this Court by Section 301 of the Act. 29 U.S.C.A. 185.

5. Plaintiff, Local #89, is the collective bargaining agent of its co-Plaintiffs herein with the Defendant and as such entered into a contract with the Defendant concerning the wages, hours and working conditions of said co-Plaintiffs. Said contract is filed herewith, made a part hereof and marked Exhibit "A". Said contract at all times herein has been in full force and effect between all the parties hereto.

6. On or about January 25, 1960, pickets were placed at the place of business of Defendant in Louisville, Kentucky, by a labor union located in Philadelphia, Pennsylvania and between whom a labor dispute existed between said Philadelphia labor union and the Defendant herein. That the Plaintiffs, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay, employees of the Defendant at Louisville, Kentucky, chose to respect and did respect the picket line of said [fol. 4] Philadelphia labor union. On February 15, 1960, said six named Plaintiffs reported to the Defendant for work, and the Defendant refused to permit them to resume their labor and still refuses to permit said six named Plaintiffs to resume work for said Defendant.

7. Plaintiffs, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay, as a result of being denied employment by Defendant, in accordance with Article VII. and Article VIII. of the contract heretofore filed as Exhibit "A" herein, filed grievances against the Defendant seeking to recover pay for all time lost from February 15, 1960, until the time of reinstatement.

8. Said grievances were processed through the channels as provided in the contract and finally referred to the

Joint Area Cartage Committee at Chicago, Illinois. That said Joint Area Cartage Committee, after hearing the grievances by said Plaintiffs, directed that said Plaintiffs be reinstated by the Defendant with full seniority and paid for all time off. Demands were made upon the Defendant to reinstate said six Plaintiffs and th pay them for all time off in accordance with the ruling of the Grievance Committee of the Joint Area Cartage Committee, and said Defendant has refused and still refuses to reinstate said six Plaintiffs or to pay them for any time since February 15, 1960.

9. It is further a provision of said contract, Article IX., that "it shall be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union • • • "

10. Said contract provides that the Defendant shall contribute to a Health and Welfare Fund the sum of $2.50 per week for each employee covered by said contract. That the Defendant has failed and refused to pay said sum [fol. 5] for each of said six employees since February 15, 1960, contrary to the provision of said contract.

11. It is further provided by Article XXV. of said contract that effective February 1, 1960, the Defendant shall pay into a Pension Plan for its employees the sum of $4.00 per week per employee. That the Defendant has failed to pay said $4.00 per week for each of said six Plaintiffs since February 15, 1960, all contrary to the provisions of said contract.

12. (a) The Plaintiff, Newton Stucker, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since September, 1949.

13. (a) The Plaintiff, Sylvester Davidson, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since September 15, 1948.

14. (a) The Plaintiff, John Kendall, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to three weeks vacation pay under the provisions of Article XXII. of said contract, he [fol. 6] having been employed by the Defendant since October 4, 1947.

15. (a) The Plaintiff, Elvin Peay, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since October, 1948.

16. (a) The Plaintiff Virgil Peay, states that his guaranteed weekly wages under said contract is the sum of $108.80 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to three weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since August 11, 1947.

17. (a) The Plaintiff, George Abell, states that his guaranteed weekly wages under said contract is the sum of $115.60 per week, and although he has offered to work and has been ready, willing and able to work, Defendant herein has refused to permit him to work at all times since February 15, 1960, and still refuses.

(b) That he is entitled to two weeks vacation pay under the provisions of Article XXII. of said contract, he having been employed by the Defendant since September 13, 1954.

Wherefore, Plaintiffs demand Judgment against the Defendant:

1. That said six employees be reinstated with full seniority under the terms of said contract.

[fol. 7] 2. For the sum of $2.50 per week per employee to be paid to the Health and Welfare Fund from February 15, 1960, and the sum of $4.00 per week per employee from February 15, 1960, to be paid to the Pension Plan, all in a lump sum until the date of reinstatement of said employees and thereafter, under the terms of the contract.

3. In favor of Newton Stucker in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $217.60 for two weeks vacation pay.

4. In favor of Sylvester Davidson in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $217.60 for two weeks vacation pay.

5. In favor of John Kendall in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $326.40 for three weeks vacation pay.

6. In favor of Elvin Peay in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $217.60 for two weeks vacation pay.

7. In favor of Virgil Peay in the sum of $108.80 per week from February 15, 1960, until he is reinstated, and in the further sum of $326.40 for three weeks vacation pay.

8. In favor of George Abell in the sum of $115.60 per week from February 15, 1960, until he is reinstated, and in the further sum of $231.30 for two weeks vacation pay.

9. For the costs of this action and for all other relief to which they may appear to be entitled.

Hardy & Logan, 506 W. Jefferson Street, Louisville 2, Kentucky, JUniper 3-8371, By ....., Attorneys for Plaintiffs.

[fol. 8]

IN THE UNITED STATES DISTRICT COURT

ORDER DISMISSING COMPLAINT—February 2, 1961

A pre-trial conference was held in chambers on February 2, 1961 and there appeared Mr. Ralph H. Logan, for the plaintiffs, and Mr. H. Bemis Lawrence, for the defendant.

The question of jurisdiction having been considered and it appearing that this action is controlled by Westinghouse Salaried Employees v. Westinghouse Electric Corporation, 348 U. S. 437, 99 L. Ed. 510, 75 S. Ct. 488 (1955),

It Is Ordered that the motion of the defendant, Riss and Company, Inc., to dismiss is sustained and the complaint dismissed.

Henry L. Brooks, United States District Judge.

February 2, 1961.

For the Plaintiffs: Mr. Ralph H. Logan, 506 West Jefferson St., Louisville, Kentucky.

For the Defendant: Mr. H. Bemis Lawrence, 1129 Kentucky Home Life Bldg., Louisville, Kentucky.

A Copy Attest, Martin R. Glenn, Clerk, by Loraine Miller, Deputy Clerk.

[fol. 9]

EXHIBIT "A" TO COMPLAINT

Central States
Area

LOCAL CARTAGE
AGREEMENT

Covering Employees
of Private, Common,
Contract and Local
Cartage Carriers

for the period of
February 1, 1958, to January 31, 1961
(Union Label)

ARTICLE VIII.

Grievance Machinery and Union Liability.

Section 1. The Unions and the Employers agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise.

Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

(a) Where a Joint Local Area Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint State Cartage Committee. Such a decision will be final and binding on both parties.

(b) Where a Joint Local Area Committee is unable to agree or come to a decision on a case, or where there is no such committee, it shall, at the request of the

[fol. 10] Union or the Employer involved, be appealed to the Joint State Cartage Committee at the next regular constituted session.

Minutes of the local committee shall set forth the position and facts relied on by each party, but each party may supplement such minutes at the hearing before the Joint State Cartage Committee.

(c) Where a Joint State Cartage Committee, by a majority vote, settles a dispute, no appeal may be taken to the Joint Area Cartage Committee. Such a decision will be final and binding on both parties.

(d) Where a Joint State Cartage Committee is unable to agree or come to a decision on a case, it shall, at the request of the Union or the Employer involved, be appealed to the Joint Area Cartage Committee at the next regularly constituted session, unless the parties mutually agree to umpire handling. Matters pertaining to interpretation are not subject to umpire handling at this level.

(e) It is agreed that all matters pertaining to the interpretation of any provisions of this contract shall be referred, at the request of any party at any time, for final decision to the Joint Area Cartage Committee after first being processed by the Joint State Cartage Committee.

(f) Deadlocked cases may be submitted to umpire handling if a majority of the Joint Area Cartage Committee determine to submit such matter to an umpire for decision. Otherwise either party shall be permitted all legal or economic recourse.

(g) Failure of any Joint Committee to meet without fault of the complaining side, refusal of either party to submit to or appear at the grievance procedure [fol. 11] at any stage, or failure to comply with any final decision, withdraws the benefits of ARTICLE VIII.

* * * * * * *

ARTICLE XXII.

Vacations.

Section 1. Employees who have worked sixty per cent (60%) or more of the total working days during any twelve (12) month period shall receive vacations and vacation pay as follows:

One year employment	one (1) week
Three years or more	two (2) weeks
Twelve years or more	three (3) weeks
Twenty years or more	four (4) weeks

(commencing Jan. 1, 1956)

Vacation pay shall be computed by multiplying the number of hours in the guaranteed work week by the then prevailing straight time hourly rate at time of vacation. Compensation for the 4th week of vacation only, shall be computed at forty (40) times the then prevailing straight time hourly rate.

Section 2. During the first year of employment the employee must work sixty per cent (60%) of the total working days in order to obtain his vacation and must have been employed for the full year. During the second and subsequent years, the man must have worked sixty per cent (60%) of the total working days of the year, but need not be employed for the full year to be eligible for the vacation. No more than one vacation will be earned in any 12-month period.

Section 3. All vacations earned must be taken by employees and no employee shall be entitled to vacation pay [fol. 12] in lieu of vacation except, however, any employee who has quit, been discharged, or laid off before he has worked his 60%, shall be entitled to the vacation pay earned on a pro rata basis provided he has worked his first full year; and further provided that at the option of the employer the employee shall either take the fourth week of vacation or shall take only three (3) weeks and receive compensation for the fourth week of vacation.

Section 4. The vacation period of each qualified employee shall be set with due regard to the desire, seniority, and preference of the employees, consistent with the efficient operation of the Employer's business.

Section 5. Employee, upon the giving of a reasonable notice of not less than one (1) week to his Employer, shall be given his vacation pay before starting his earned vacation.

ARTICLE XXIII.

Holidays.

Section 1. Regular employees shall not be required to work and shall be paid eight (8) hours' pay at the straight time hourly rate for the following six (6) holidays: New Year's Day, Labor Day, Memorial Day, Thanksgiving Day, Fourth of July, and Christmas Day, even when not worked, and regardless of the day of the week on which it falls, provided they comply with the qualifications set forth hereinafter.

Section 2. Regular employees called to work on any of the above-listed holidays shall be paid a minimum of six (6) hours' pay at two (2) times the regular rate in addition to the eight (8) hours referred to above.

Section 3. In the event a holiday falls within an employee's vacation period, he shall be granted an additional day's vacation with pay.

[fol. 13] Section 4. In order to qualify for eight (8) hours of straight-time pay for a holiday not worked, it is provided that regular employees must work the regular scheduled work-day which immediately precedes or follows the holiday, except in cases of proven illness or unless the absence is mutually agreed to.

Section 5. Employees who are serving their thirty (30) day probationary period are not entitled to holiday pay for holidays falling within the probationary period.

Section 6. Regular employees are entitled to holiday pay if the holiday falls within the first thirty (30) days of

absence due to illness, non-occupational injury, or within the first six months of absence due to occupational injury, or during period of permissible absence. This does not apply to employees taking leave of absence for full time employment with the Union.

Section 7. If any holiday falls within the 30-day period following an employee's lay-off due to lack of work, and such employee is also recalled to work during the same 30-day period but did not receive any holiday pay, then in such case he shall receive an extra day's pay for each holiday, in the week in which he returns to work. Said extra day's pay shall be equivalent to eight (8) hours at the straight-time hourly rate specified in the contract. An employee who was laid off because of lack of work and is not recalled to work within the aforementioned 30-day period is not entitled to the extra pay upon his return. Under no circumstances shall the extra pay referred to herein be construed to be holiday pay, nor shall it be considered as hours worked for weekly overtime.

[fol. 14]

ARTICLE XXIV.

Health and Welfare Benefits.

The Employer shall contribute to the Central States, Southeast and Southwest Areas Health and Welfare Fund, which is to be administered jointly by the parties, the sum of Two Dollars and Fifty Cents ($2.50) per week for each employee covered by this Agreement who has been on the payroll thirty (30) days or more.

Employers presently making payments to the Central States, Southeast and Southwest Areas Health and Welfare Fund, and employers who may subsequently begin to make payments to such fund, shall continue to make such payments for the life of this Agreement.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties hereto to enter in to appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken

or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than six (6) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Health and Welfare Fund during the period of absence.

[fol. 15] There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Health and Welfare Fund, regardless of whether the equipment rental is at the minimum rate or more, and regardless of the manner of computation of owner-driver compensation.

Contributions to the Health and Welfare Fund must be made for each week on each regular or extra employee even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other Health and Welfare Fund.

Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

ARTICLE XXV.

Pensions.

Effective February 1, 1958, the Employer shall contribute to the CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND the sum of Three Dollars ($3.00) per week for each employee covered by this Agreement who has been on the pay roll thirty (30) days or more. Effective February 1, 1960, the weekly contribution shall be increased to Four Dollars ($4.00) per week.

This Fund shall be the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND. There shall be no other pension fund under this contract for operations under this contract or for operations under the Southeast and Southwest Areas contracts to which Employers who are party to this contract are also parties.

By the execution of this Agreement, the Employer authorizes the Employers' Associations which are parties [fol. 16] hereto to enter into appropriate trust agreements necessary for the administration of such fund, and to designate the Employer Trustees under such agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

If an employee is absent because of illness or off-the-job injury and notifies the Employer of such absence, the Employer shall continue to make the required contributions for a period of four (4) weeks. If an employee is injured on the job, the Employer shall continue to pay the required contributions until such employee returns to work; however, such contributions shall not be paid for a period of more than six (6) months. If an employee is granted a leave of absence, the Employer shall collect from said employee, prior to the leave of absence being effective, sufficient monies to pay the required contributions into the Pension Fund during the period of absence.

There shall be no deduction from equipment rental of owner-operators by virtue of the contributions made to the Pension Fund, regardless of whether the equipment rental is at the minimum rate for more, and regardless of the manner of computation of owner-driver compensation.

Contributions to the Pension Fund must be made for each week on each regular or extra employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other pension Fund. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this paragraph.

. . . . . .

[fol. 16a]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON and ELVIN PEAY, Plaintiffs-Appellants,

versus

RISS AND COMPANY, INC., Defendant-Appellee.

Appeal From the United States District Court for the Western District of Kentucky, at Louisville, Kentucky, Henry L. Brooks, Judge.

Appendix for Defendant-Appellee

[fol. 17]

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 3985

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION #89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON, and ELVIN PEAY, Plaintiffs,

v.

RISS AND COMPANY, INC., Defendant.

ANSWER AND COUNTERCLAIM—Filed July 21, 1960

Answer.

For its answer to plaintiffs' complaint, defendant, Riss and Company, Inc., states as follows:

First Defense.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense.

There is another action pending between the parties to this suit filed by the defendant in the Jefferson County, Kentucky, Circuit Court, Chancery Branch, First Division, Action No. 47351, captioned "Riss and Company, Inc. v. General Drivers, Warehousemen and Helpers, Union #89, et al.", said suit being filed on January 28, 1960, and in which each and all of the plaintiffs in instant action are duly before the court and have filed responsive pleadings [fol. 18] thereto and in which a restraining order was entered on the same date; that said action arose out of the same circumstances and involves the same issues; that jurisdiction has already been assumed and a final determination has not been had in the aforesaid state court action and that no petition for removal to the United States District Court was asked for or granted within the statutory period and the plaintiffs are now estopped from bringing this action.

Third Defense.

Defendant admits the allegations stated in numerical paragraphs numbers 1 and 3(a), (b) and (c) of the complaint; denies numerical paragraph number 4 in that jurisdiction of this controversy is now with the Jefferson Circuit Court and that no petition for removal to the United States District Court was filed within the statutory period, and denies each and every allegation stated in the remaining numerical paragraphs to the extent and degree set forth in the counterclaim herein.

Fourth Defense.

If the work stoppages in question were authorized by Local 89, the contract was terminated as of January 25, 1960, because it failed to use all possible means, or any means, of a settlement pursuant to the first paragraph of

Article VIII of the contract. The defendant pleads in the alternative as a further defense that if the said actions comprising a work stoppage, tie-up and strike were unauthorized, then the provisions of Section 2 of Article VIII would be applicable and that neither of the plaintiffs is entitled to any relief whatsoever as there was no obligation upon the defendant to take back the employees after abandoning their posts of employment.

[fol. 19] Fifth Defense.

The grievance procedure outlined in paragraph 8 of the complaint was moot and a sham proceeding in that the contract was breached by the actions of the plaintiffs on January 25, 1960.

Wherefore, the defendant demands that the complaint be dismissed, held for naught and for its costs, as well as any and all other relief to which it may be entitled.

Counterclaim.

Count 1.

Without waiving its defenses outlined hereinabove, but still relying thereon, the defendant, for its counterclaim against the plaintiffs, and each of them, states as follows:

A. The defendant, Riss and Company, Inc., is a Delaware corporation engaged in the general trucking business as a common carrier and has a terminal location at 3433 South Seventh Street Road, Louisville, Kentucky.

B. The plaintiff, General Drivers, Warehousemen and Helpers, Union #89, is an unincorporated labor organization with a membership of hundreds of persons and is an autonomous body which elects its officers and representatives, which officers and representatives act for and represent the entire Union membership, said plaintiff having its headquarters at 3813 Taylor Boulevard, Louisville, Kentucky.

C. Plaintiffs, Virgil Peay, John Kendall, George Abell, Newton Stucker, Sylvester Davidson and Elvin Peay are former employees of the defendant who abandoned their

posts of employment on or subsequent to January 15, 1960, at the terminal headquarters of the defendant in Louisville, Kentucky. Each of said plaintiffs is a member of the aforesaid Local Union #89 and plaintiff, Elvin Peay, is a steward thereof.

[fol. 20] D. The contract filed as Exhibit "A" in the complaint was entered into between the defendant and Local 89 and was in full force and effect until January 25, 1960, when it was breached and terminated by the actions of the plaintiffs as outlined hereinbelow.

E. Prior to January 25, 1960, Local 107 of the same Union, located at Philadelphia, Pennsylvania, with the same type of contract as Exhibit "A", arbitrarily breached said contract with the defendant and created a tie-up, went on strike and created a work stoppage without first using any means whatsoever for settlement, all contrary to the said written contract; that members of Local 107, which has the same international president and identical international constitution and rules and regulations as Local 89, caused to, and did, send numerous of its members to the Louisville terminal of this defendant, arriving during the work day of January 25, 1960, and commenced carrying and displaying conspicuously strike signs with reference to this defendant.

F. Without any notice whatsoever, the aforesaid six individual plaintiffs left and abandoned their posts of employment at the said time and place, and plaintiff, Elvin Peay, steward, and John West, Business Agent of Local 89, informed this defendant that Local 89 was on strike against this defendant and that it was an authorized one.

G. Said actions of the Union were contrary to the following provision of Article VIII of the contract in question:

> "The Unions and the Employers agree that there shall be *no strike, lockout, tie-up, or legal proceedings without first using all possible means of a settlement*, as provided for in this Agreement, of any controversy which might arise." (Emphasis ours.)

[fol. 21] That despite said provision the Union, its officers, agents, representatives and members made no attempt whatsoever to use any means of discussion or settlement, thereby breaching and terminating said contract at that time and place.

H. The six individual plaintiffs left their posts of employment, went to the outer entrance of the defendant's terminal and proceeded to, and did, march back and forth near said entrance carrying signs "Local 89 on Strike" and "Riss-Strike", and physically threatened customers, invitees and other employees of the defendant who were seeking to enter and depart from the said terminal; as a result thereof, the plaintiffs, and each of them, acting in concert with each other, did strike, committed a tie-up and work stoppage and continued for a period of several weeks, all contrary to the written contract and without any attempt to invoke the grievance procedure.

I. That the aforesaid actions unlawfully interfered with the defendant's business and unlawfully coerced business customers to refrain from doing business with this defendant and that on March 3, 1960, in Civil Action No. 3927, United States District Court, Western District of Kentucky, in the case captioned "John C. Getreu, et al., vs. General Drivers, Warehousemen and Helpers Union, Local 89, et al.", this Court entered a temporary injunction restraining the said Union from unlawfully interfering with the business of the defendant after a finding that it had done so and that it was guilty of unfair labor practices; that said activities continued by each of these plaintiffs for a period of many days and that the defendant was damaged to the extent of $50,000.00.

J. To the best knowledge, information and belief of the defendant, and it so alleges, each of the six individual plaintiffs have been employed continuously since February [fol. 22] 16, 1960, and are not employees as alleged in numerical paragraph 2 of the complaint and that the Union continued, either directly or indirectly, in breach of the written contract, to interfere with the natural flow of the defendant's business and continued to do so for a long

period of time, all to the detriment and damage of the defendant.

Count II.

For Count II of its counterclaim against the plaintiffs, and each of them, the defendant states as follows:

In the alternative, if the aforesaid actions comprising a tie-up, strike and work stoppage were not authorized by Local 89, then Section 2, Article VIII of the said contract would be applicable and the six individual plaintiffs would be liable, individually and severally, for the damages complained of hereinabove and they would be estopped from claiming any relief whatsoever as the defendant is empowered to make other arrangments for handling its business, which it did, on or about February 1, 1960, by separate agreement with an independent contractor and the defendant asserts all of the provisions of aforesaid Section 2 as if copied in its entirety herein.

Wherefore, the defendant, Riss and Company, Inc., demands:

(1) A judgment, jointly and severally, against the plaintiffs, and each of them, in the total amount of $50,000.00, if it be found that the activities complained of were authorized.

(2) In the alternative, if it be found that the activities were unauthorized, then said judgment shall be jointly and severally against the six individual plaintiffs hereinabove named.

[fol. 23] (3) For its costs herein expended and for any and all other relief to which it may appear to be entitled.

H. Bemis Lawrence, 1129 Kentucky Home Life Building, Louisville, Kentucky, Attorney for Defendant.

Certificate.

I hereby certify that a copy of the foregoing Answer and Counterclaim was this ..... day of July, 1960, mailed to Hardy and Logan, Attorneys for Plaintiffs, 506, West Jefferson Street, Louisville 2, Kentucky.

/s/ Bemis Lawrence.

[fol. 24]

In the United States District Court

Amended and Supplemental Answer and Counterclaim

Comes the defendant and with leave of Court files its Amended and Supplemental Answer and Counterclaim without relinquishing its previous defenses, but still relying thereon, and states as follows:

1. The captioned action is on the Fall, 1960, docket and is set for pretrial conference on September 8, 1960. The issues have been joined.

2. Notwithstanding, the plaintiffs instituted a strike and commenced picketing at the terminal of the defendant located at 3433 South Seventh Street Road, Louisville, Jefferson County, Kentucky, at 8:00 A.M. on Tuesday, August 23, 1960; that the announced and admitted purpose of the said strike and picket line results from the same and identical issues involved in the within action and pertains to the same parties and factual situation. The individual plaintiffs abandoned their posts of employment with the defendant on January 25, 1960, and have not been employed by the defendant since that date and are not now employed. The plaintiffs, and each of them, have acted in concert with each other for the purpose of causing the said picketing and striking.

3. The plaintiffs elected to file this civil action involving the facts at hand in this Court and the sole purpose of the said picketing and striking is to exert pressure and influence upon the defendant in the compromising and culminating of this action; that said picketing and striking are arbitrary, capricious and extremely injurious to the

business of the defendant; that immediate and irreparable injury, loss and damage will result to the defendant and to its customers before notice can be served and a hearing had thereon; that the actions of the plaintiffs are in violation of the rights of this defendant and that it is entitled to [fol. 25] immediate relief in the form of a temporary restraining order and made permanent at a later date; that injunctions have been asked for, and have been granted in modified form, by the defendant against the plaintiffs, or a portion of them, in the past, in the Jefferson County, Kentucky, Circuit Court. This Court has assumed jurisdiction of the facts involved in this case and said Court has jurisdiction to issue the restraining order requested by virtue thereof and the plaintiffs are estopped from striking and picketing because of their said election in filing this action and that said controversy will be decided by this Court.

4. As a result of the foregoing, the business of the defendant has been seriously hampered and curtailed, customers are being lost and its operations in Louisville, Kentucky and elsewhere in the United States are being adversely affected with the resultant increase of cost to the defendant in the conduct of its business; that as a result of the actions of the plaintiffs as outlined in detail in the original Answer and Counterclaim the said picketing and striking are contrary to the original contract between the parties and consequently the picketing and striking now being engaged in are without foundation, willful and malicious and for the single purpose of doing harm and injury to the defendant; that each day in which said unlawful action of the plaintiffs continue, defendant is suffering and will continue to suffer additional damages of $10,000.00 each day the picketing and striking last.

Wherefore, the defendant demands, in addition as in its original Answer and Counterclaim, as follows: (1) A temporary restraining order enjoining the plaintiffs, and each of them, and the membership of the plaintiff Local 89 from striking, picketing, molesting, harassing or interfering with the business of the defendant in any way, shape,

form or fashion. (2) For additional damages in the amount [fol. 26] of $10,000.00 each and every day that said striking and picketing continues and that said judgment be jointly and severally against the plaintiffs, and each of them. (3) For its costs herein expended and any and all other relief to which it may appear to be entitled.

H. Bemis Lawrence, 1129 Kentucky Home Life Building, Louisville, Kentucky, Attorney for Defendant.

I, Joseph O. Mathes, Terminal Manager of Riss & Company, Inc., Louisville, Kentucky, being duly sworn, state that I have read carefully the allegations contained in the foregoing Amended and Supplemental Answer and Counterclaim and that they are true.

Joseph O. Mathes.

State of Kentucky,
County of Jefferson, ss.:

I, H. Bemis Lawrence, a notary public in and for the aforesaid county and state, hereby certify that the foregoing instrument was this day, in said county and state, subscribed, acknowledged and sworn to before me by Joseph O. Mathes.

Witness my hand this 29th day of August, 1960.

My commission expires December 5, 1963.

.....
Notary Public, Jefferson County, Kentucky.

[fol. 27]

EXHIBIT "A" OF COMPLAINT

Central States
Area

LOCAL CARTAGE AGREEMENT

Covering Employees
of Private, Common,
Contract and Local
Cartage Carriers

for the period of
February 1, 1958, to January 31, 1961

ARTICLE VIII, Subsection (h) of Section 1:

(h) In the event of strikes or work stoppages or other activities which are permitted in case of deadlock, default, or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement unless otherwise agreed to. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this agreement.

Section 2:

It is further mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agree-
[fol. 28] ment, serve upon the Company a written notice, which notice will list the Union's authorized representatives who will deal with the Company, make commitments for the Union generally, and in particular have the sole authority

to act for the Union in calling or instituting strikes or any stoppages of work, and the Union shall not be liable for any activities unless so authorized. It is further agreed that in all cases of an unauthorized strike, slowdown, walk-out, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members. While the Union shall undertake every reasonable means to induce such employees to return to their jobs during any such period of unauthorized stoppage of work mentioned above, it is specifically understood and agreed that the Company during the first twenty-four (24) hour period of such unauthorized work stoppage shall have the sole and complete right of reasonable discipline short of discharge, and such Union members shall not be entitled to or have any recourse to any other provisions of this Agreement. After the first twenty-four (24) hour period of such stoppage, and if such stoppage continues, however, the Company shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slowdown, walk-out, or any other cessation of work, and such Union members shall not be entitled to or have any recourse to any other provision of this Agreement. It is further agreed and understood that the Central States Drivers Council shall not be liable for any strike, breach, or default in violation of this Agreement, unless the act is expressly authorized by its Executive Board. A properly designated officer of the Central States Drivers Council shall, within twenty-four (24) hours after request is made to the Secretary of the Central States Drivers Council, declare and advise the party making such request, by telegram, whether [fol. 29] the Council has authorized any strike or stoppage of work. The Central States Drivers Council shall make immediate effort to terminate any strike or stoppage of work which is not authorized by it without assuming liability therefor.

It is understood and agreed that failure of the Central States Drivers Council to authorize a strike by a Local Union shall not relieve such Local Union of liability for a strike authorized by it and which is in violation of this Agreement.

[fol. 30]

Before: Martin and Cecil, Circuit Judges, Darr, District Judge.

CAUSE ARGUED AND SUBMITTED—December 9, 1961

This cause is argued by Ralph H. Logan for plaintiffs-appellants and by H. Bemis Lawrence for defendant-appellee and is submitted to the court.

[fol. 31]

Appeal from the United States District Court for the Western District of Kentucky.

JUDGMENT—January 31, 1962

This Cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for Entry: Lester L. Cecil, U.S. Circuit Judge.

[fol. 32]

No. 14534

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal from the United States District Court for the Western District of Kentucky, at Louisville, Kentucky.

GENERAL DRIVERS, WAREHOUSEMEN & HELPERS, LOCAL UNION NO. 89, VIRGIL PEAY, JOHN KENDALL, GEORGE ABELL, NEWTON STUCKER, SYLVESTER DAVIDSON and ELVIN PEAY, Plaintiffs-Appellants,

v.

RISS AND COMPANY, INC., Defendant-Appellee.

OPINION—January 31, 1962

Before: Martin and Cecil, Circuit Judges, and Darr, Senior District Judge.

CECIL, Circuit Judge. This is an appeal from an order of the United States District Court for the Western District of Kentucky dismissing the complaint of the plaintiffs-appellants for want of jurisdiction in the court to hear and determine the issues presented by the complaint.

It appears from the record in the trial court that the question of jurisdiction was considered by the trial judge at a pretrial conference, at which counsel for all parties were present. From the record no evidence was taken and there was no stipulation of facts. The order of dismissal was made upon defendant-appellee's motion at the conference.

[fol. 33] The question now before this Court is whether it is apparent from the face of the complaint that it did not state a cause of action or that the trial court lacked jurisdiction to determine the questions presented by it.

The plaintiffs in the action are General Drivers, Warehousemen and Helpers, Local Union No. 89, and six individuals alleged to be employees of the defendant company.

The defendant is a Delaware corporation engaged in the interstate transportation of freight by motor vehicle, as a common carrier, and maintains a freight terminal at Louisville, Kentucky. The action involves a contract between the plaintiff union and the defendant. Jurisdiction is claimed under section 301 of the National Labor Relations Act. (29 U.S.C. 185) A copy of the contract is attached to the complaint and made a part of it.

Article VII of the contract provides for a Joint Local Area Committee, a Joint State Cartage Committee and a Joint Area Cartage Committee whose functions are to settle disputes that cannot be settled between the Employer and the Local Union. Article VIII prescribes grievance procedure. The parties agree that there shall be no strikes, lockouts, tie-ups, etc., without first using all possible means of settlement. Disputes are first to be taken up with the employer and union and then to be processed through the above named committees. Subdivision (g) provides, " . . . failure to comply with any final decision, withdraws the benefits of Article VIII."

It is alleged in the complaint that the grievances of the individual plaintiffs were processed through the machinery provided for in Article VIII and that the Joint Area Cartage Committee ordered the defendant to reinstate them with their seniority and pay them lost wages. It is further alleged that the defendant refused to carry out this order.

The procedure described in Article VIII is a grievance procedure. It is not an agreement for compulsory arbitration, in exchange for a no-strike or work stoppage clause. There is no finality to this grievance procedure. The facts of this case do not bring it under the principle of *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448. The order of the Joint Area Cartage Committee was not an arbitration award which could be entered by the courts as was the case in *A. L. Kornman Co.* v. *Amalgamated Clothing Workers*, 264 F. 2d 733, C.A. 6, cert. denied, 361 U.S. 819. Recent pronouncements of the [fol. 34] Supreme Court with reference to arbitration are not controlling here. See *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 and *United*

Steelworkers of America v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574.

It is alleged in the complaint inter alia that, on or about January 25, 1960, pickets were placed at the defendant's place of business in Louisville, by a labor union of Philadelphia, Pennsylvania; that a labor dispute existed in Philadelphia between the Philadelphia union and the defendant; that the individual plaintiffs herein "chose to respect and did respect the picket line of said Philadelphia labor union"; that on February 15, 1960, the named plaintiffs reported for work and the defendant refused to let them resume work.

The plaintiffs seek reinstatement of the individual plaintiffs with seniority and lost pay from February 15, 1960.

The defendant claims that the individual plaintiffs violated the contract by leaving their jobs on January 25th. The plaintiffs point to a provision of Article IX of the contract which reads as follows: "It shall not be a violation of this contract and it shall not be cause for discharge if any employee or employees refuse to go through the picket line of a union or refuse to handle unfair goods." This clause must be read with another clause of this Article. "The insistence by any Employer that his employee . . . go through a picket line after they have elected not to, *and if such refusal has been approved in writing by the responsible officials of the Central States Drivers Council*, shall be sufficient cause for an immediate strike of all such Employer's operations without any needs of the Union to go through the grievance procedure herein." (Emphasis added) There is no allegation in the complaint that the refusal to go through picket lines was given such approval.

It is our opinion that the complaint does not contain facts which would show that the plaintiffs were warranted under the contract to leave their jobs on January 25th.

Finally, it appears that the purpose of the action is to recover for the individual plaintiffs' lost wages together with incidental benefits to the Union based on the payment of wages to employees. This we think brings the facts of this case within the ambit of *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437.

[fol. 35] As was said in that case, p. 461, "Nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here, in which the union is suing on behalf of employees for accrued wages. Therefore, we conclude that Congress did not confer on the federal courts jurisdiction over a suit such as this one." See also *Communications Workers of America, AFL-CIO* v. *The Ohio Bell Telephone Co.*, 169 F. Supp. 822, affirmed 265 F. 2d 221, C.A. 6, cert. denied 361 U.S. 814.

The trial judge was right in dismissing the complaint and for the reasons stated herein the judgment of the District Court is affirmed.

[fol. 36]

ORDER DENYING PETITION FOR REHEARING—March 21, 1962

Upon consideration of the petition for rehearing, it is hereby denied.

Lester L. Cecil, Circuit Judge.

[fol. 37] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 38]

SUPREME COURT OF THE UNITED STATES

No. 180—October Term, 1962

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, et al., Petitioners,

vs.

RISS AND COMPANY, INC.

ORDER ALLOWING CERTIORARI—October 8, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Goldberg took no part in the consideration and decision of this petition.